UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Michael H. Johnson, Plaintiff, vs. Wells Fargo Bank, N.A., Defendant.	)	File No. 11-CV-1254 (PJS/JJG) Minneapolis, Minnesota September 20, 2011 8:30 a.m.

BEFORE THE HONORABLE PATRICK J. SCHILTZ
UNITED STATES DISTRICT COURT JUDGE
(MOTIONS HEARING)

APPEARANCES

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Proceedings recorded by mechanical stenography; transcript produced by computer.

P R O C E E D I N G S

IN OPEN COURT

THE CLERK: All rise. United States District Court for the District of Minnesota is now in session, the Honorable Patrick J. Schiltz presiding.

THE COURT: Good morning. Please be seated.

All right. We are here today on the case of Michael Johnson v. Wells Fargo Bank. The case is Civil No. 11-1254. If I could have the attorneys make their appearances, please, beginning here (indicating).

MR. MORTNER: Good morning, Your Honor. Moshe Mortner representing Michael Johnson.

THE COURT: Good morning, Mr. Mortner.

MR. GOERLITZ: Good morning, Your Honor. Jared Goerlitz on behalf of the defendant.

THE COURT: Mr. Goerlitz, good morning.

Mr. Mortner, let me talk to you first, if I could.

MR. MORTNER: Yes, Your Honor. Shall I approach the podium?

THE COURT: Yeah, if you would, please. Just let me know when you're set there.

MR. MORTNER: Thank you, Your Honor. I'm ready.

THE COURT: Okay. I want to kind of get to the merits of the underlying dispute first. Let me start by asking you this: Do I understand your brief correctly that

you concede that if the note -- when I say "note," I mean the loan. When I say "mortgage," I mean the security interest. Okay?

MR. MORTNER: Yes, Your Honor. I understand the distinction.

THE COURT: Okay. That if the note was in fact transferred to the trust, to Wells Fargo, on the start-up day as part of the initial batch of loans that created the trust, then you wouldn't have a case, that Wells Fargo would have standing to foreclose on you and essentially you wouldn't have a way of blocking the foreclosure?

MR. MORTNER: That is correct, Your Honor. Of course, I must state the caveat that when we say "transfer," we mean transfer in accordance with the law, which in the State of Minnesota is governed by the U.C.C. Article 3.

THE COURT: Okay. And I don't know whether you'd have some argument because we didn't get into the details of how the loan would've been transferred, but if I understand Wells Fargo correctly, they are at least alleging that this loan was part of the start-up of the trust. I don't know much about real-estate law, so if I use wrong expressions, forgive me, but --

MR. MORTNER: At the formation.

THE COURT: At the formation of the trust this was part of it, that there was an exhibit that listed all the

loans that were part of this thing. It's listed there as part of the loans. And I understand there is no evidence of this or affidavits, but at least the indications seem to be that this loan was there from the beginning. And my understanding is that you concede that unless you can find something wrong with the transfer of the loan or something, that essentially if they did have the loan, if they owned the loan from the beginning, they would have the ability to foreclose on Mr. Johnson at this point. That part is right?

MR. MORTNER: You are absolutely correct, Your Honor.

THE COURT: Okay. Now, the thing that I am a little concerned about, though, is I think you conceded the point for maybe the wrong reason, and let me just ask you about this.

MR. MORTNER: Well, Your Honor, first of all, I wouldn't not concede a point that's so obviously clear under the law.

THE COURT: Okay. Well, I'm not sure that -- well, let me get --

MR. MORTNER: Go ahead, Your Honor.

THE COURT: I think you're right, but you may be right for a different reason.

MR. MORTNER: Okay.

THE COURT: As I understand your reason for

conceding this point, that you say that -- in fact, let me just find your language. This would be -- you, in your brief, you know, had the four examples; first, second, third, fourth.

MR. MORTNER: That's in the reply brief.

THE COURT: In the reply brief, yeah. There are three briefs from each of you, so one of the briefs.

And you say -- this is on page 7 of the reply brief, I believe -- that would be -- the situation I just gave you would be your second there: The foreclosing entity, Wells Fargo, has a legal assignment of the note but no assignment of the mortgage security instrument. Under these circumstances, the foreclosing entity, Wells Fargo, would still have an interest in the mortgage loan and standing to foreclose, because the court in *Jackson* held that a legal assignment of the promissory note with no accompanying assignment of the security instrument constitutes an equitable assignment of the security instrument that meets the requirements necessary to commence a foreclosure.

What puzzles me about this is I read *Jackson* exactly the opposite. *Jackson* said, and I'm going to quote you one sentence from *Jackson* --

MR. MORTNER: Okay.

THE COURT: -- "Our precedent also establishes

that in order to foreclose by advertisement, both record and legal title" -- three kinds; equitable, record, and legal -- "both record and legal title must concur and coexist at the same time in the same person or persons who alone have the authority to foreclose the mortgage regardless of other equitable interest vested in third parties." It seems to me *Jackson* is saying pretty clearly that you must have record and legal title to foreclose. Having an equitable interest in the mortgage does not give you standing to foreclose. So the reason you conceded the point I don't think is correct under Minnesota, but --

MR. MORTNER: All right, Your Honor. I mean, I hear your -- I'm sorry. Did I cut you off?

THE COURT: No. No. Go ahead.

MR. MORTNER: Certainly in my home state of New York, the courts have held very clearly that the note and the collateral instrument must travel together and that a foreclosing party must have legal assignment of both.

I believe that what *Jackson* did in the State of Minnesota was that it said that if the foreclosing party has legal title of the note and they don't have the actual possession -- legal title assignment, if you will -- of the collateral instrument that the court would through operation of equitable principles allow them nonetheless to foreclose as though they had the collateral instrument.

THE COURT: I didn't see that in *Jackson*. In fact, I saw the contrary. What *Jackson* says is that you -- remember in *Jackson* it's MERS who's doing the foreclosing. MERS has the legal title. MERS does not have an equitable interest in --

MR. MORTNER: Well, actually, courts have held that MERS doesn't have legal title. Its title is by virtue as nominee. That's why many courts throughout the land have held that an assignment from MERS is invalid, because it's a nominee and it's not the title holder.

THE COURT: Well, I've got to hang on --

MR. MORTNER: I don't know, maybe we're getting off on a --

THE COURT: No, I just want to stick with Minnesota law. It's hard enough for me. This is a murky area of the law. I always feel like I'm getting in a time machine and traveling back 150 years when I'm doing these mortgage cases. It's one area of the law where two-thirds of the cases cited to me by the parties are 100 years old or more.

What I understood *Jackson* to be saying is that, first of all, you have to split the note from the mortgage. And with respect to the mortgage, there's three types of interests in the mortgage. There is the equitable interest in the mortgage. There's the person who holds the legal

title to the mortgage. And then there is the record title holder, who is down on the --

MR. MORTNER: Well, now, when you say "the equitable interest in the mortgage," are you referring to the collateral instrument or to the note?

THE COURT: I'm referring to the collateral instrument only now. Okay?

MR. MORTNER: Okay. Yeah.

THE COURT: What MERS said essentially in Minnesota is that you can distinguish between the entity that holds legal title to the mortgage, and in *Jackson* that was MERS according to the Minnesota Supreme Court, and the entity that has an equitable interest in the mortgage, which in *Jackson* was whoever the lenders were.

But the Minnesota Supreme Court said in order to foreclose, you have to have legal title and record title, and that's why it was MERS doing the foreclosing in *Jackson*, because MERS was the one that had the legal title and the record title. I assume that's why in this case MERS assigned the legal title to Wells Fargo, because Wells Fargo couldn't come in here and foreclose without legal title. And I assume that's also why the assignment was recorded, because Wells couldn't be here and foreclose without the record title.

MR. MORTNER: Uh-huh.

THE COURT: So, again, what I'm getting back to is the fact that the concession you made seems to me -- unless I'm missing something -- seems to be based on a misunderstanding of Minnesota law.

I don't think Wells would have had standing to foreclose the Johnson mortgage if it had just received the note and not received legal title to the mortgage and not also been recorded as the legal title holder to the mortgage.

MR. MORTNER: Okay, Your Honor.

THE COURT: Okay. Now, next point: I still think your concession might be right because I'm not sure what in the -- if this transaction unfolded as Wells alleges -- that is, at the start-up of the trust it received the note; and it received the equitable interest in the mortgage, which follows the note in Minnesota, your equitable rights in the mortgage follow the note in Minnesota, but it left legal title in MERS and then later MERS assigns the legal title to Wells when Wells is preparing to foreclose, would that violate the terms of the trust agreement in your view? If those facts are as Wells alleges, would that violate the terms of the trust agreement?

MR. MORTNER: I think that in order to answer your question correctly we need to distinguish between what the trust considers possession of an asset and what the courts

consider the right to foreclose.

So to answer your question, according to the trust agreement, possession of an asset must be acquired at the time of start-up or with exceptions.

THE COURT: So that's what I was wondering, because I know less about trust law than I know about mortgage law.

MR. MORTNER: Your Honor, I want to give you the most correct answer I can because --

THE COURT: And maybe you don't know. I'm just looking for the actual language of the trust agreement on which you rely.

MR. MORTNER: Well, that would be --

THE COURT: It says it shall not acquire any assets for any REMIC -- I don't know how they say it --

MR. MORTNER: REMIC, yeah.

THE COURT: -- if it would result -- unless the counsel says it won't result in an adverse REMIC event.

MR. MORTNER: Yes, Your Honor. That would be Section 10.02?

THE COURT: Right. So on the facts of this case as posited by Wells Fargo -- I'm not asking you to agree at this point, but just assuming that what Wells Fargo said is true. So on the start-up day the trust has the loan and, therefore, an equitable interest in the mortgage. Legal

title is left in MERS. February of 2001 MERS assigns the legal title and it's recorded so that Wells Fargo can foreclose. Would that be a prohibited transaction under the trust?

MR. MORTNER: I think not, Your Honor.

THE COURT: It seems to me it would be hard to say it would be since, first of all, the whole trust in the way it distinguishes between MERS mortgages and non-MERS mortgages seems to contemplate exactly this kind of thing going on.

And also it would be hard if you already own the equitable interest in the trust and you are basically just getting -- it would be like if you already own the car and it was your possession, everybody agrees you own it and the former owner was merely going through the formality of transferring the title to you, I doubt that would be acquiring an asset. It would be acquiring proof of an asset you already acquired.

MR. MORTNER: Yeah. I guess what the ultimate question would be to take it a step further, Your Honor, is would such a late acquisition in that fact scenario, where they already had possession of the note, would that constitute a negative REMIC event under the Internal Revenue Code.

THE COURT: Yeah, well, now we're in tax law,

which joins trust law and mortgage law.

MR. MORTNER: That's what makes it so interesting.

THE COURT: "Interesting" is one way to phrase it. It's at least an area where I'm not --

But it seems to me that the motions you have before me now involve a lot of jousting about the procedural posture and who has to come forward with what and so on. My main interest at the end of the day is what's the right answer to the underlying question.

MR. MORTNER: Yes, Your Honor.

THE COURT: I mean, if the facts are as Wells Fargo alleges, and it seems like they probably will be shown to be -- I'm not foreclosing you from coming up with something, but if the facts are as they say, I'd be surprised if this violated the trust agreement or was void under New York law or would create an adverse event under the tax code, but I don't know.

As I say, the whole trust agreement -- and certainly they obviously -- lots of lawyers worked on this thing. I'm sure that there's like a master out there and people borrow from it, but I'd be surprised -- I mean, MERS mortgages are -- everybody knows what they are and there's tons of litigation. It looks like the trust agreement was set up contemplating exactly this kind of a transaction.

MR. MORTNER: Actually, Your Honor, I think the

trust agreements were set up in order to shield investors from double taxation, and I don't think they contemplated this particular situation; had they done so, they would've followed the dictates of the UCC.

What they were concerned with was that the IRS shouldn't be able to come in and say, hey, you've got some late mortgages, we're going to take away your pass-through status in the REMIC, and you're going to get taxed at the REMIC level and at the investor level. So having created an instrument to prevent that by saying that any late-acquired mortgages will be void, therefore, the IRS comes to us and says, hey, late-acquired mortgage, nope, it's a void transaction, we're safe. Investors are safe. And I think that's what they had in mind. But, unfortunately, they have to be bound by that for their sake. They have to be bound by those same provisions when it cuts the other way, when they do have a late-acquired asset and they can't now say it's not void as they would've liked to say when it's the IRS claiming it.

THE COURT: But our question is whether if you at start-up take the loan and take the equitable interest in the mortgage, leaving only legal title to MERS, and then four years after start-up you have MERS transfer that legal title to you whether that is an asset that is acquired by the trust or whether that would be, whatever it's called, an

adverse REMIC event.

MR. MORTNER: Yep.

THE COURT: I'm thinking probably not, but I can't say I know at this point. It's not something that you all involved me in.

MR. MORTNER: Your Honor, initially we focused on the event of the late assignment of the mortgage because it seemed to us that that was going to be the basis of Wells Fargo's argument in part because of the timing of the events. The assignment was made in February and on March 9th, 2010 they --

THE COURT: 2011.

MR. MORTNER: -- 2011 they recorded the assignment and on the same date they served the notice of foreclosure. It seems like that was the case.

But getting to the question then -- I just want to address one other point, if you will, Your Honor. I'm sure Mr. Goerlitz can speak to this, but, as I recall, Wells Fargo has not alleged that there was an actual transfer of the note at start-up. What I think they said was that there was a blank endorsement and that that transferred the note. And I address that in my argument, when you're ready to hear that, as to why that's totally insufficient under the UCC to constitute a transfer.

THE COURT: Is that in your briefs? I don't

remember that.

MR. MORTNER: Yes, Your Honor. Yes, Your Honor.

THE COURT: I easily could've missed it in the thing.

MR. MORTNER: That's okay. Well, it arose in the -- as I recall, if I can direct the Court, I believe I made that argument in response to the opposition to the motion for summary judgment in my reply -- yes, in the reply brief. That would be Document 23 under the ECF. Would you like me to speak on that?

THE COURT: It seems to me that the posture this case is in essentially is that you both seem to agree that ultimately the status of this note is what's going to be determinative in the sense that Wells Fargo I don't understand to be contesting that if it didn't acquire the note at the start-up. If the first time it got any legal interest in the Johnson mortgage was in February of 2011, then that would have violated the trust agreement.

Now, Wells Fargo has other arguments, like --

MR. MORTNER: I think that is absolutely correct, Your Honor. That is my understanding of the --

THE COURT: And at the same time you seem to be conceding, or at least not contesting, that if Wells Fargo did get that loan at start-up, that probably what happened in February of 2011 didn't violate the trust agreement.

MR. MORTNER: I think that's right, Your Honor.

THE COURT: Okay. But what we don't have in the record right now is any admissible evidence about the loan, which is the crucial thing. We have this finger pointing about whose job it is, blah, blah, blah. At the end of the day, though, I suspect my decision is going to be we need to hear about the loan. It seems like you could do a very quick discovery on this and get the facts as to what exactly happened with respect to the loan. And then you could make your argument about the UCC, if you still wanted to, and they could respond. We're in this very weird procedural posture because of the way the case unfolded and --

MR. MORTNER: Yes and no.

THE COURT: -- it's not anybody's fault, but we are.

MR. MORTNER: I don't quite agree with you on this point, Your Honor. If I may, I will explain why.

THE COURT: Sure.

MR. MORTNER: Let's first start with what does Wells Fargo contend. They contend that the note was transferred by a blank endorsement. Now, on a Rule 56 motion we have to look to the substantive law of the state. Here we would be looking, therefore, at the Uniform Commercial Code of the State of Minnesota, Article 3, which governs negotiable instruments. So we're dealing here with

what constitutes a legal transfer of a note.

They say the note was transferred and that it was a blank endorsement. We have two kinds of endorsements. We have special endorsements and we have blank endorsements. Just very simply a special endorsement says paid to the order of Wells Fargo.

THE COURT: Yeah, and a blank is paid to bearer, right.

MR. MORTNER: Correct. So what the UCC says is that in both cases, but most certainly in the case of a blank endorsement, there are two elements to establish negotiation. And, Your Honor, I'm referring to Minnesota Statute 336.3201, transfer of possession, whether voluntary or involuntary, of an instrument by a person other than the issuer to a person that is to say by the bank, the issuer is Mr. Johnson, other than the issuer to a person who thereby becomes its holder. If an instrument is payable to an identified person, which would be a special endorsement, negotiation requires transfer of possession of the instrument and its endorsement by the holder. If an instrument is payable to bearer, it must be negotiated by transfer of possession alone.

THE COURT: Yeah, the physical copy of the note.

MR. MORTNER: They have to have it. What kind of discovery do we need here? Rule 56(e)(2), we've established

a prima facie case that they have no standing. If you've got the note, bring it in. There's a little more than that. They would have to show --

THE COURT: I wish that Mr. Goerlitz had just moved for summary judgment and given us an affidavit and given us a note. Instead, we have these odd arguments about what you needed to allege and what was their job to allege. Like I said, we have a very nice, clean issue here once you guys tee it up. It just hasn't been teed up. Instead, we have this standing issue where they allege you don't have standing to be complaining about this, which we'll address. I don't know physically who possesses the notes. But Mr. Goerlitz hasn't moved for summary judgment and so that's why he hasn't come up with the note. I assume if he had moved for summary judgment, he would have told us something.

MR. MORTNER: No, in opposition to my argument under 56(e)(2), which is the argument that says the burden of proof shifts to the non-movant --

THE COURT: But here's the problem: You confuse both Wells Fargo and me with what kind of motion you were bringing. Wells briefs your motion as though it's a motion for judgment on the pleadings. A motion for judgment on the pleadings focuses only on the four corners of the pleadings, doesn't get into affidavits and things. Rule 56 only applies to summary-judgment motions. And your motion is

docketed as First Motion For Preliminary Injunction and Judgment on the Pleadings. Your motion is captioned, "Plaintiff's Motion For Judgment on the Pleadings." Your notice of hearing is docketed and captioned, "Judgment on the Pleadings." The first sentence of your memorandum is, "Plaintiff Michael Johnson respectfully submits the following memorandum in support of his motion for judgment on the pleadings." Now, elsewhere you also say summary judgment, but you have both there. But the caption of the motion, the docketing of the motion was all as a motion for judgment on the pleadings. Rule 56 doesn't require anybody to come forward with any proof to defeat a motion for judgment on the pleadings. In fact, we only look at the face of the pleadings. So I can't grant summary judgment against Wells when, for one thing, if there's confusion as to what kind of motion you were bringing.

Also, to deny Wells's motion to dismiss your complaint, I think it's probably -- that Wells is probably wrong that you had some obligation to make affirmative allegations about the note in your complaint. That's really their defense to your claim. You don't have to allege facts to negate an anticipated or even unanticipated defense.

MR. MORTNER: Yes, Your Honor.

THE COURT: But for me to grant you summary judgment (sic), I would have to say that you are entitled to

judgment as a matter of law -- or, I'm sorry, to grant you judgment on the pleadings, I'd have to say you're entitled to judgment as a matter of law on the pleadings. The pleadings include their allegations that they did get the note at the start-up of the trust, and the pleadings include the trust agreement which clearly contemplates the legal title to MERS mortgages remaining with MERS. I don't think I'm at the point that I can grant you either judgment on the pleadings or summary judgment.

I think you folks need to take about a month of discovery, tee this up correctly, and we can decide the issue or it may even go away if you get satisfactory proof that they got a physical copy of the note at the start-up.

MR. MORTNER: It would require physical copy, plus some sort of additional evidence of the transaction itself, an affidavit of an officer saying that they received possession of it.

THE COURT: Yeah, and they may. I don't know if they have got that or not.

MR. MORTNER: But, Your Honor, we did have Rule 26 disclosure in this case and none of that evidence was provided, and it would have been essential under Rule 26.

THE COURT: Well, all I'm saying, Mr. Mortner, is it's obvious the status of the note is critical; when, if ever, the note was transferred, how the note was

transferred. And I need a record on that. And then I need a nice, clean argument on given that this is what the facts are about the note, your argument that it wasn't effectively transferred to the trust and therefore the first time the trust got any interest in this was in February of 2011, which was a prohibited transaction, which is void under New York law, and I follow that.

Now, I just flag something else for you that you should look at. There is a California bankruptcy case. The case is called *In Re: Doble*, D-O-B-L-E.

MR. MORTNER: I am very familiar with that case.

THE COURT: I didn't read it, my law clerk did. He just told me late yesterday that it seems to hold that this New York trust law that you are relying upon doesn't apply to business-related trusts.

MR. MORTNER: It's an interesting case because the judge was coming out -- with all due respect to her, she came out of left field with that one because she then cites law from another state. I think she cites --

THE COURT: My law clerk said he wasn't terribly convinced by the analysis.

MR. MORTNER: I think she cites, like, an Iowa case in support of her findings about New York law. I mean, it's really weird. I have no problem -- I don't think it's a case Your Honor would want to follow, and I'd be happy to

show you why.

THE COURT: It may be. I just wanted to flag it. I haven't read it because I knew I wouldn't have to get to it for today's purposes. My law clerk was looking around at the related law.

MR. MORTNER: Good law clerk, Judge.

THE COURT: It's something that maybe Wells will raise.

All right. One other thing. I just made a note to myself, and this is totally an aside. Your brief keeps quoting the outdated versions of the Rules of Civil Procedure. The Federal Rules of Civil Procedure -- it's called restyled -- they were completely rewritten in 2007. Your briefing keeps quoting the pre-2007. Like I think you rely a lot on 56(e)(2), which exists now, but it isn't the same thing anymore. So I'm just letting you know that it's time to get yourself a new copy of the Federal Rules of Civil Procedure.

MR. MORTNER: Thanks, Judge. That's embarrassing.

THE COURT: It was a restyling, meaning it didn't change anything substantively. So the substantive requirements you are relying on are still in the rules, but you want to quote the language.

MR. MORTNER: Well, thank you, Judge. Thank you.

THE COURT: Let me just see if I have other

questions for you on this and then I'm going to ask you about a couple other matters. Just give me one second to look at my notes here.

Okay. On the standing issue -- mostly I want to ask Wells Fargo about the standing issue. On the other issues I think it will probably work best if I talk to Wells first, and then I will have you back up if you have more to say.

Let me just ask you out of curiosity. It's odd to see a New York lawyer coming in on one of these local mortgage cases. You don't have to tell me this if there's something confidential, I'm just curious as to how you ended up in a Minnesota mortgage case.

MR. MORTNER: Your Honor, I have a wonderful client, Mr. Johnson. He works as a fire sprinkler inspector. I don't know if you are a baseball fan, but I had represented Lenny Dykstra in the United States Bankruptcy Court specifically with a single issue as to the predatory loan that had been issued by Chase when he purchased Wayne Gretzky's house. Lenny was on the radio, national programming, saying nice things about me. Mr. Johnson calls me up and he says, I'm bringing you out here.

THE COURT: Oh, okay. It was just an unusual connection.

MR. MORTNER: I said I don't know if you can -- he is a great guy. He really believes in the law. He says, I want to have you out here.

THE COURT: All right. Well, you're more than welcome. I just was curious. Usually these mortgage cases there's kind of a local bar here and usually the same dozen lawyers you see on either side of the case. I just haven't seen a New York lawyer come in before. You are very welcome. All right.

MR. MORTNER: Pleasure to be here. Thank you, Your Honor.

THE COURT: I will talk to Mr. Goerlitz.

Mr. Goerlitz.

MR. GOERLITZ: Thank you, Your Honor.

THE COURT: Let's talk about the merits first, the same thing I was talking to Mr. Mortner about. Is your understanding of Minnesota law the same as mine, which is that only the holder of legal title, which also has to be record title, can foreclose --

MR. GOERLITZ: It absolutely is, Your Honor.

THE COURT: -- at least by advertisement? I assume that if the holder of the equitable interest in the mortgage wanted to foreclose, they'd have to do it through judicial proceeding. I assume they might have some way to do it, but they couldn't do it through advertisement.

MR. GOERLITZ: Sure. It's kind of an interesting mess, you could say, and one that I don't think the Minnesota Supreme Court really got into in *Jackson v. MERS*. What is legal title to foreclose? I think we know as much that MERS had legal title in that case to foreclose. It, obviously, had record title. But if you look at the definition of legal title, it says that it's apparent ownership, which, in my opinion, leaves open the question that you could leave record title in the name of whoever and whoever is the underlying rights holders of the debt with the equitable interest could tell anybody to foreclose in their name; MERS, myself, the Court, whoever, you can go ahead and foreclose. The issue becomes then in the context of foreclosure law do they really have legal title to foreclose? Are they being authorized by the equitable interest to foreclose? And that's the big unknown question there, and that's why --

THE COURT: It's an interesting question. So we know who has equitable title. That's the owner of the loan that the mortgage secures. We know who has record title. That's the person whose name appears down in the county records.

MR. GOERLITZ: Right.

THE COURT: Yeah. It is a little unclear from *Jackson* what legal title is if it's not the person whose

name is on the books and it's not the person who has the loan what the legal title is. They clearly thought MERS had it in *Jackson*.

MR. GOERLITZ: And I think that's because of the MERS system tracking the loans and there being a specific indication under their system of who has the right then to enforce or authorize MERS to foreclose in its name.

Basically what lenders have done in response to the MERS litigation is say we're just not going to foreclose in the name of MERS. We're going to foreclose in a party specifically with legal title to foreclose. Now, that might be the actual owner of the debt and it might not, because Fannie Mae never forecloses in its name. You never see a name in the foreclosure of them or Freddie Mac. You always see it in the name of somebody else, which generally is the servicer foreclosing in its name on behalf of Fannie Mae and Freddie Mac.

THE COURT: In this case to avoid those questions, you have Wells taking the assignment and recording it. So you have Wells by March of 2011 being the record title holder, the legal title holder, and the equitable title. So we have all that in Wells. But then just as you close one set of arguments you open these arguments about the trust agreement.

Now, you never really address this directly -- you

didn't really have to -- but if for some reason you did not legally acquire the loan back at the start-up date, would you agree with Mr. Mortner's -- or let me put it differently. If you didn't acquire anything, any kind of equitable or legal rights with respect to the Johnson mortgage until February of 2011, would you agree that that would have been a prohibited transaction under the trust agreement?

MR. GOERLITZ: I agree it would be a problem and one that would have to be flushed out. I think Mr. Mortner himself agrees that there can be transactions after that start-up date. You just need to follow certain procedures in order to make that authorized transaction.

THE COURT: They can't create an adverse event. They can't be adverse REMIC events.

MR. GOERLITZ: Right. I think the idea is, for example, if you have a bad asset, a foreclosed asset, you could maybe shuffle assets in and out, but you have to follow certain procedures under trust law and tax law in order for that to not trigger certain problems.

THE COURT: But those would not have been followed with respect to this because it looks like the people who were undertaking this transaction in February of 2011 assumed that the loan had been part of the initial batch of loans, right?

MR. GOERLITZ: And you're correct, Your Honor.

I kind of want to back up because it seems like the Court's main concern here with our motion to dismiss is that it seems to be troubled by granting that motion and penalizing the plaintiff for leaving out any allegations to the note, and that was completely --

THE COURT: Well, just to be clear what my position is, I may very well grant your motion and make Mr. Mortner file -- I wouldn't dismiss the case with prejudice. We never dismiss the cases with prejudice on *Iqbal* motions this early in the lawsuit. I would simply have him replead.

We're going to get to this loan issue one way or the other, which is why I'm asking you about it. The quicker -- you know, we have six briefs, and a hearing, and a day of my time to get ready for the hearing, and it seems to me we're just shuffling cards here. We're eventually going to have to get to this question of the loan and that's why I'm asking about it.

MR. GOERLITZ: Correct. Correct. What troubles me is the position -- I think the Court was correct earlier that we've had no obligation to present any of this evidence to the Court yet.

I think, more importantly, this case has been going on for a number of months and the plaintiffs haven't

provided any sort of discovery or record to the Court that we don't have any of this information all of it which they could've very well have provided, such as a request for the original note and the like. I think we're getting outside the record.

THE COURT: See, I get impatient with this sort of fighting. What I would love to have happen is the two of you just to talk after we're done here today and just agree on how you're going to get them the information about the note; a copy of the note, who had a copy of the note, how was the note transferred, what does the note say. This is all something we can -- both of you have an obligation, not just to me but to your clients, to try to get this thing resolved as efficiently as we can. You're two reasonable people. Get together. Figure out how you're going to get the information about the note. I assume it's going to all be uncontested. The basic facts are going to be uncontested. We can easily make a record as to exactly everything that's relevant to the note and then we can have these arguments about the UCC and the trust agreement. That doesn't mean that your point isn't right or wrong, but at this point in the litigation no judge would ever dismiss this lawsuit with prejudice. The most any judge is going to do is ask Mr. Mortner to refile his complaint, and we're going to be right back at square one. I'd like to cut threw

a lot of this, and let's quickly get the record assembled on the loan. Mr. Mortner may drop his lawsuit at that point. He has acknowledged that if certain facts alleged by Wells are true -- or if certain facts are true, I should say; if in fact you got physical possession of the note at the start-up date, it sounds like he agrees that his lawsuit probably has no merit. But so if that's true, I assume that that's going to be your position that you did take possession of the note or maybe you have a different interpretation of the UCC, but let's just cut to it.

MR. GOERLITZ: And my point, Your Honor, is I have the original note. There's no request been made. I'm just making the point I disagree with his assertion that we aren't providing anything. It hasn't been requested. It's all there. We want an order of this Court that says you can't just rely upon the mortgage. That's what we want, because we get these cases where they look at the assignment of mortgage and they say your whole securitization process is a house of cards, this was six years later or three years later after the loan was securitized, you can't foreclose. Our point is you need more than just the assignment of mortgage. You can allege that and get all that information. But this is a hot bed argument across the nation and we're looking from an order from this Court that says you cannot solely plead an allegation regarding the assignment of the

mortgage without addressing the debt in order to have a plausible argument. Whether the Court wants to dismiss it with or without prejudice I'm not going to disagree with. That's, I think, a judgment call at the court level. But our perspective is, and this was a calculated attempt, lock in the complaint so they don't do a later amendment just by virtue of the motion to dismiss and seek an order that says this complaint does not create a plausible argument because it solely relies upon the mortgage, you need more than that, and that's what we're seeking.

THE COURT: I think your argument is one that you could get reasonable judges to go either way on. My reaction is this: In Minnesota, as I said, the law is clear that you have to have record and legal title to foreclose. And, again, this is a lawsuit to enjoin a foreclosure. So what matters in this lawsuit is who has legal and record title to the mortgage. Okay? The plaintiff has alleged that you didn't get legal title until February 1st of 2011 essentially. He is not using these words, but that's essentially what he is arguing. He has also alleged that your acquisition of legal title on February 1st of 2011 was unlawful under the trust agreement and therefore void under New York law. So I'm not sure he needs to say much more than that. You know, I'm filling in a little bit here, but basically in Minnesota you need legal title to foreclose.

Wells didn't get legal title until February of 2011. Acquiring legal title in February of 2011 violated the trust agreement because it bars acquisition of assets after the start-up date, I'm paraphrasing, blah, blah, blah.

Now, your response is, no -- I mean, you don't disagree with point one, and you don't disagree with point two. You do need legal title and you did get legal title on February 11th and not until February 11th.

With respect to point three, you disagree saying our acquiring legal title on February 11th did not violate the trust agreement because we had earlier acquired equitable title when we got the loan at the start-up date and this kind of arrangement is specifically envisioned by the trust agreement and so on. That strikes me more as your defense to their claim. And it's always a very difficult line to draw, and it's part of the problem with *Iqbal* and *Twombly* talking about plausibility. It almost makes these mini summary-judgment motions. Generally, the plaintiff just has to tell you their claim. Their claim is you didn't get legal title until February of 2011, that violated the trust agreement, it's unlawful under New York law and, therefore, you never got legal title and you can't foreclose on me.

MR. GOERLITZ: Can I interject?

THE COURT: Yes.

MR. GOERLITZ: Your Honor, we allege we've always had legal title; in fact, that's what *Jackson v. MERS* held. I think what we did, for the purposes of clarification, was transfer that legal title to the trust. But our allegation is we could've foreclosed in the name of MERS and merely by doing that assignment of mortgage changes nothing under the law.

THE COURT: Well, that's a different argument. I don't have any idea what that argument means. *Jackson* has a situation that is our situation pre-February 1st of 2011. The title is in MERS's name. It's recorded in MERS's name. Somebody else owns the loan. The Minnesota Supreme Court said that it was MERS that had legal title. I mean, that's clear from *Jackson*. So before February 1st of 2011, it appears to me that under *Jackson* MERS held the legal title. Wells Fargo/the trust -- I don't know how you distinguish the two because it's Wells Fargo as trustee -- held the loan, you say, and held the equitable title. As I read *Jackson*, I don't think you could have foreclosed in your own name by advertisement. I think you either would have had to use a judicial proceeding or you would have had to direct MERS to do it or MERS would have had to foreclose on your behalf. But we're getting back to the pleading issue.

I think they have pled their theory. Your argument strikes me as a defense to their theory. It's an

argument for why they're wrong. I'm not sure that they have to plead it in their complaint. As I say, it's always a close issue as to -- your argument is basically this kind of a complaint isn't plausible unless they have accounted for the loan in the complaint, and that could be right. My reaction is more that they've laid out their theory for you. And plaintiffs' theories are wrong lots in complaints, and then you move for judgment on the pleadings or you move for summary judgment and you win because they're wrong. It isn't a pleading issue. It isn't an *Iqbal* issue. It's a they're wrong issue.

I think where you are right about the Rule 8 problem is when they tell you that the assignment in 2011 was a prohibited transaction under the trust agreement with no indication as to why. And it isn't enough to attach a 287-page agreement and say go look in there and you will find out what we mean. I think that that's probably true. If you want, I can make Mr. Mortner explain more thoroughly his theory as to why, but you know the theory now. I'm not sure whether that would do any of us any good. It's up to you.

MR. GOERLITZ: Sure. My concern, you know, again, I think we agree on the deficiencies in the pleading. Of course, we would love for the Court on that pleading to dismiss it with prejudice. It sounds like the Court is not

inclined to do that. So if the Court is not inclined to do that, I think then there's only limited discovery here, you know, relative to that issue. Like I said, we're ready, and willing, and able to address that issue.

THE COURT: If you've got the note, if you've got a physical copy of the note back at the time that the trust was created, it sounds to me like you are not going to have a lot of trouble winning this lawsuit. I'd like to cut to the chase. Let's get that done, and let's get the lawsuit resolved, rather than have the procedural arguing.

Let me ask you, because this is an issue that doesn't go away no matter what happens, and that's this question of standing. I know that that is you're saying that essentially it's kind of none of Mr. Johnson's business, this between MERS, and Wells Fargo, and the original lender. I know there's case law that -- I mean, you've cited case law, but I just have a hard time believing that's correct. The argument is this: Suppose that I find out that my next-door neighbor has defaulted on his loan and, therefore, the person who holds the mortgage could foreclose on him. So I bring a foreclosure action against my neighbor saying I'm hereby suing to foreclose on your home. He literally can't say in defending or seeking to enjoin the foreclosure Schiltz doesn't have my mortgage, he has no right to be bringing this foreclosure action? Your

argument is that he literally can't make that argument? That's not a defense?

MR. GOERLITZ: Of course, Your Honor, you are taking the extreme to make a point.

THE COURT: Yeah. Yes, I am.

MR. GOERLITZ: Here's my perspective as a lender's counsel: It's no surprise to the borrower who's foreclosing. On that notice of foreclosure sale set up by the legislation they make it clear who's seeking to foreclose. They also make it clear who the servicer is of your loan is.

One of my biggest frustrations in hearing these cases is when the borrower says I have no idea who to talk to, and I have no idea who to pay, it's somebody out there has my mortgage and it's all a house of cards, that's frustrating for me because we have all this Truth & Lending Act about servicing mortgages and it's readily accepted in the industry. Everybody writes a check to a servicer.

THE COURT: Mr. Goerlitz, I have a ton of these cases. They are as frustrating to me. I am sick to death of I only got three copies of my TILA notice, not four copies. But I have to say Mr. Mortner hasn't brought one of these abusive sort of copy off the internet complaints. He has a theory. It might be right. It might be wrong. It's a very narrow theory. It's a very clean theory. I

understand his argument. He's been, I think, very candid in conceding that if certain facts are true, his theory won't work. So I totally get your frustration. I feel a lot of that often. I almost weekly am getting two or three of these mortgage cases, and I would say two-thirds or three-quarters of them are basically taking complaints off the internet and they are not true. They are abusive. They are just designed to delay the day that the person gets kicked out of their house. This isn't such a lawsuit.

MR. GOERLITZ: No, and if I gave that impression, I didn't want to. But my point, and in answering this question about standing, is when you get this notice of foreclosure sale, you should be able to tell on the face whether it's relatively legitimate or not.

THE COURT: Yeah.

MR. GOERLITZ: And the reason for that is it gives you a lot of information; the date of the mortgage, the original amount, who the original mortgage holder was, who the assignments were to, who your servicer is, the legal description, all the statutorily-created information.

My argument on standing is, is you just can't say that loan was transferred improperly. You need something more than that. And something more would be I make my payments to Bank of America, the servicer is Wells Fargo or there's some missing link on that notice of sale that makes

it appear --

THE COURT: Let me stop you, though. Your point you're just making here isn't that someone in Mr. Johnson's position doesn't have standing to argue that the person seeking to foreclose doesn't have the right to foreclose. You're just saying he needs more detail or he needs a legitimate argument. But that's different than saying he doesn't have the right to say the person who is seeking to foreclose me, he doesn't have the right to do it because he doesn't own my mortgage, he doesn't have legal title to my mortgage.

MR. GOERLITZ: And it goes to your extreme situation where you don't have the legal right to foreclose to say a borrower cannot contest that ever is, I think, an extreme problematic situation.

Where borrowers don't have standing is when they contest something relating to the foreclosure that is clear on its face, such as here. We have an assignment from MERS to the trust. They're saying it's wrong without any additional information. My perspective is that they don't have standing to raise that argument just purely on its face. They would need more facts to show that somehow it is wrong.

THE COURT: Mr. Mortner hasn't just said there's an assignment and it's wrong and told us nothing more than

that. I agree the complaint is sketchy. As I said, as an original matter, I could make him amend the complaint. But his papers have certainly sketched out his theory. His theory is that the assignment of the mortgage -- that, again, you need legal title to the mortgage to foreclose. You didn't get it until February of 2011. You didn't record it until March of 2011, and that was an after-acquired asset. It's barred by the trust agreement. It's void under New York law and, therefore, you don't have a lawful assignment. He has a very specific theory.

MR. GOERLITZ: And we have a very specific response to that and that is under that theory they're not saying that Wells Fargo does not meet Minnesota law to foreclose. They're saying that there's these other issues with regards to the transfer between these parties that somehow make it inappropriate under the law.

THE COURT: No, they are saying that Wells Fargo doesn't meet Minnesota law. Minnesota law requires Wells to have legal title to the mortgage, and he's saying you don't have legal title to the mortgage.

MR. GOERLITZ: That's not in the complaint I read, though. The complaint I read is that they are saying --

THE COURT: I'm talking about what's in the papers as a whole now.

MR. GOERLITZ: Well, right. Well, right. So

their perspective is that I, as a borrower, should be able to contest a transfer from MERS or throughout this whole securitization process that I am not a party to, that I have no evidence regarding any of these transfers, other than basically the plain terms of the trust agreement. They want to contest issues between other parties. I mean, what's stopping people from saying that servicers are violating terms of servicing agreements with Fannie Mae and Freddie Mac that create defects in the foreclosure? The point is that --

THE COURT: I agree with you in general that kind of thing they wouldn't have standing to do. But when the defect is one that results in the person who's bringing the foreclosure action not having the right to bring the foreclosure action, I think they can challenge it. Now, like anybody bringing any kind of challenge, they do have to have a theory. They have to have some evidence, all that. Your frustration seems to be more that the theory isn't detailed enough or isn't explained as well in the complaint, rather than the standing issue. It just can't be that if someone tries to foreclose on you and that person has no legal right under Minnesota law to foreclose because they never acquired legal title in the mortgage that you don't have standing to make that argument. You do have standing to make the argument. You have to make it well. You have

to plead it correctly.

MR. GOERLITZ: And I think it gets to the pleading requirement, Your Honor, because they need to show a real injury, not some fictitious or possible injury.

THE COURT: Well, wait. That's a whole different issue. I don't want you to bring that in. We will talk about that, the irreparable injury kind of thing.

MR. GOERLITZ: No, I'm getting to as far as the standing requirements. In order to have standing, you have to show a real injury. You can't just show some potential of an injury or some possible injury or some superficial injury.

THE COURT: Yeah. If he wins, I enjoin the foreclosure of his house. If he loses, I don't enjoin the foreclosure of his house. He has a lot turning on that.

MR. GOERLITZ: See, our perspective if he wins, we can just turn around and foreclose in the name of MERS because he's arguing that assignment is void.

THE COURT: You could, but I don't think -- if somebody brings a lawsuit and they will get relief from the lawsuit -- that is, a harm will be prevented, and someone else out there can do the same thing to them, I don't think that means they don't have standing in the first lawsuit. I understand what you're saying. I don't think it deprives him of standing. That's like, again, to take my

hypothetical, if I am foreclosing on my neighbor's house, I don't think I can argue to the judge, Your Honor, if I don't do it, his bank is going to eventually get around to doing it, so he doesn't have any standing because if it's not me, it's going to be the bank that forecloses on him. I want him out of here. I want this thing to go faster.

MR. GOERLITZ: I'm going to concede that it's a very difficult argument that is very fact specific in each situation. In this situation, nobody is disputing that Wells Fargo owns the note. Nobody is disputing Wells Fargo is getting paid. Nobody is disputing --

THE COURT: He does not concede that you own the note. He wants to see the proof.

MR. GOERLITZ: Wants to see the proof.

THE COURT: Right.

MR. GOERLITZ: But he's not saying that -- the flip side to this argument -- our perspective is if he wins, his best day is somebody else forecloses because this is an issue between the trust. So it's not an issue --

THE COURT: Same with my hypothetical --

MR. GOERLITZ: -- and his mortgagor that nobody can foreclose or that the wrong party is foreclosing because they have no interest in this. He is arguing, like they did in the *Farmers Merchants* case that we cited, that this is a dispute between corporations and I should have the benefit

of that dispute between the corporations. And that case specifically said that if there's a transfer between those corporations, the borrower can't hang his hat on that.

THE COURT: Yeah, but, see, the different -- I think -- this is the *Rush* case, right, *Farmers*? The *Rush* case, as I read it, was an ultra vires case. What the person being foreclosed upon was saying or the person in that position was saying was that the first bank, it was ultra vires for them to transfer the loan to the second bank. But under Minnesota law, ultra vires acts are enforceable. If I, the corporation, sign a contract with you and I'm acting in excess of my authority, you can still enforce that contract. It still exists. *Farmers* has a line in there about, yeah, there can be no doubt as to the respondent's ownership of the note. Here there is doubt. I mean, that's the claim.

Although Mr. Johnson didn't talk about it that much in connection with the standing, in another of his briefs he cited this case *Casserly v. Morrow*. You probably have memorized all these Minnesota mortgage cases. *Casserly v. Morrow* was a case where a guy owns land. He executes a mortgage to Minneapolis Threshing Machine Company. Minneapolis Threshing Machine Company then assigns the mortgage to Morrow, and Morrow forecloses on the mortgage. And the landowner challenged based upon the validity of the

assignment. It said the assignment from Minneapolis Threshing Machine Company to Morrow was an unlawful assignment, exactly as Mr. Johnson is saying that the assignment from MERS to you was an unlawful assignment. And the Minnesota Supreme Court said that's right and it set aside the foreclosure.

Now, if the landowner in *Casserly* has the authority to sue to set aside the foreclosure based on the invalidity assignment from the bank to Morrow, I don't know why Mr. Johnson would not be able to sue to enjoin the foreclosure based on the invalidity of the assignment. It seems like the same case to me.

MR. GOERLITZ: Similar, but an important distinction, the four corners of the assignment of mortgage from MERS to the trust, nobody is disputing its validity. What they are contesting is this agreement between all these other parties, tax law and you know -- they are contesting not the four corners of the assignment, which absolutely they have standing to contest. However, they want to contest an agreement between parties that they're not a part of, they have no relationship to, they have no interest in.

THE COURT: And if that's all they were doing, I think you would have a decent argument, but they have the added thing of New York law because it violates that agreement it becomes void. If it was just violating the

agreement so all that would do is give the parties to the agreement a right to sue each other, then I'd have some sympathy for your argument. But they are also bringing in New York trust law, which is where the public kind of comes in and says if it violates this trust agreement, not only can people who are part of the agreement sue each other, but it has no effect as law. If the assignment has no effect as a matter of law, you don't have the legal title and you can't foreclose.

MR. GOERLITZ: Well, again, if we look at the assignment and look at the trust agreement, the trust agreement specifically says you can hold the mortgage in the name of MERS. There's nothing in the trust agreement that says that that assignment of mortgage is problematic.

THE COURT: That's an argument on the merits, though. That's saying that they're wrong. It's not saying they don't have standing, that they're not allowed to make the argument.

Your standing argument is that Mr. Johnson can't make the argument, he has no right to argue that this assignment was invalid. I think he does have the right to make the argument. You in turn can respond that, well, he has made the argument and he is wrong and here's why he is wrong. If you are right, then you win.

MR. GOERLITZ: We're probably not going to agree

on this issue, but I think it's clear the law says there are circumstances when a borrower does not have standing to contest the foreclosure. I think that's clear under *Jackson v. Mers,* although they didn't specifically say it, and some of the older Minnesota case laws. So now it's for us to figure out what cases apply and what cases don't apply.

Our perspective is if you're going to look at the four corners of the assignment or you're going to look at anything related to the foreclosure requirements, such as that there is a default or that the mortgage or any assignment thereof be of record and the other requirements of, I think it is, 580.02, absolutely you have standing.

The situations you do not have standing is when you get into issues that are not either related to the four corners of the documents or to the statute, such as this trust agreement. And I think in this case you're saying that I am arguing the merits, but the trust agreement is part of the record, and the record says --

THE COURT: No, you are misunderstanding. I don't think the argument is that it violates the trust agreement. I think you may be right that if that's all they were saying they would not have standing. That's why the New York statute is so important, because the New York statute says if it violates the trust agreement as a matter of law, it never happened, it's illegal, and then that's a different

order of argument.

The argument that Mr. Mortner is making is that under New York law this was an invalid assignment. And if we start there and work backwards -- so it isn't just a question of violating a private agreement between two people who aren't the mortgagor. It's an assignment that is unlawful, is void under law, not just under contract, but under statute.

MR. GOERLITZ: Your Honor, I think you're reading something into Mr. Mortner's argument that isn't there. His argument is that the transfer of this asset to the trust violates New York trust law, not that the assignment of mortgage violates New York trust law specifically. He's saying that the entire transfer of this loan to the trust, which includes both the note and the mortgage, violates New York trust law.

THE COURT: I don't understand him to be making that argument. His argument focuses on what happens in February 1st of 2011. The loan wasn't transferred on February 1st of 2011, legal title to the mortgage was.

MR. GOERLITZ: Well, he's arguing that they both are transferred. That's the only way his argument prevails.

THE COURT: He doesn't say anything about the loan in his complaint. That's your complaint about his complaint, that he doesn't say anything about the loan.

Again, under Minnesota law the loan in a way is irrelevant. Under Minnesota law what you need to foreclose is legal title, so his complaint focuses on legal title.

MR. GOERLITZ: I'll just take you briefly through my train of thought. If we're sitting here today and we did really violate New York trust law, that assignment of mortgage is still of record. It needs to be corrected. So legitimately we have a mortgage that was transferred. Irregardless, it was transferred to this trust. It doesn't matter what date. It was transferred to the trust. We have an assignment of mortgage that memorializes the transfer of the mortgage to the trust. Mr. Mortner's argument is that entire transfer of the loan to the trust is invalid as a matter of law, which means it needs to go back to the party before it was transferred to this trust.

THE COURT: You keep going back between "loan" and "mortgage" and you're confusing me with that.

MR. GOERLITZ: Sorry. I'll start over.

So as we sit here there has been an assignment of the mortgage. And he appears to be conceding that this trust has some sort of interest in this assignment of mortgage. His issue is that the interest they obtained violates New York trust law due to the date it was obtained, after the start-up date. So if he's correct, the mortgage assignment is still going to be of record. It would either

need a court order that says that assignment of mortgage is faulty or what would more than likely happen is the trust would then assign that mortgage along with the note back to the originating party because it was found as an invalid transfer to the trust. So we still have an assignment of mortgage of record.

THE COURT: I understand it would still be recorded until it was taken off the records, which the court would order it to be. But if Mr. Mortner's theory is correct, that assignment that happened in February of 2011 never happened. It was void. So the world would exist as it existed on January 31st of 2011, which is MERS holding legal title, you holding equitable title -- it wouldn't entirely exist because there would have to be a lag while the parties were ordered or the -- who is it, the recorder, I forget who is the official who records it, but that would have to change. I don't remember what we were asking.

The bottom line here is I do think they have standing to raise this particular argument in this particular case, the argument being Wells Fargo never acquired legal title to the mortgage, which under *Jackson* they need in order to foreclose. And the reason they didn't acquire legal title is because MERS's assignment of that legal title on February 1st of 2011 was void under New York law. I believe they do have standing to make that argument.

Okay.

Next and last issue I want to raise with you is this irreparable harm argument. There's two questions here. One is do they have irreparable harm. I'm not going to issue any injunctions today. Do they have irreparable harm and do they have to plead irreparable harm.

Now, you say that in the complaint they have to plead irreparable harm. As I recall, you cited in support of that CJS in a 1954 Georgia case, which always causes a judge's eyebrows to raise because if something is true, somebody should've said it since 1954. So I'm not sure that that's right. Typically, when someone comes in on a TRO or something like that, they just explain what the irreparable harm is. They give us an affidavit explaining the irreparable harm. I've never had a party say that it isn't enough that there be irreparable harm, but you have to find it in the complaint somewhere. But in this case, I'm not sure that matters because the irreparable harm being alleged is the foreclosure on the home and that's in the complaint. They say that the home will be foreclosed on. So the question is whether foreclosing on the home, the foreclosure sale, is irreparable harm.

I did a little research yesterday and there's at least a couple -- I didn't thoroughly research this, I just spent about 20 minutes looking at it -- a couple Minnesota

appellate cases, one *Strangis v. Metropolitan Bank* that says, "Respondents would suffer irreparable harm by the foreclosure of the mortgage on their homestead. Real property is unique, which money damages may not adequately compensate..."

And more to the point to your argument about the redemption period there's a case called *Medin v. Liberty State Bank*, M-E-D-I-N, 1990, Minnesota Court of Appeals case, that says, In her affidavit Medin states that she will be irreparably harmed if Liberty State is allowed to proceed with the foreclosure sale because she will lose her homestead and will incur substantial legal fees in an attempt to reverse the foreclosure sale. Given the wide discretion accorded the trial court in determining whether a temporary injunction should issue, We believe this allegation is broad enough to imply her legal remedies are inadequate because there is no evidence to suggest she could procure the $50,000, plus costs, necessary to make a redemption. Medin's only other remedy would be money damages, which are inadequate where real property is involved. So it sounds to me like -- again, this is based on very quick research, though, but there is some Minnesota authority for the notion that despite the existence of the redemption period, a foreclosure sale does cause irreparable harm to a homeowner.

MR. GOERLITZ: Here's my perspective on that, Your Honor, and I think it's well articulated in our brief, why we don't think that's irreparable harm: The first point I want to make is it seems to me like TROs are granted probably a little more willy-nilly than lenders would like in the context of the foreclosures that we're seeing every day. And it is ultimately a discretionary issue. And I think that leaves then the Court of Appeals in a relative bind to overturn on abuse of discretion the granting of a TRO. I haven't looked at those cases. I am familiar with *Strangis*, if that's how it's pronounced.

THE COURT: *Strangis*.

MR. GOERLITZ: My perspective is this: At any point from now to 100 years from now, presuming this case is still ongoing, which we hope it isn't, but the Court can issue an order voiding that foreclosure sale. I don't have the complaint in front of me, but I'm assuming their allegations say foreclosure should be enjoined or any other and further just relief as the Court deems just and equitable. I contest every single TRO at this procedural posture because I see no harm to the borrower because they can continue to live in the property during the litigation while getting an order at some point in the future that says our foreclosure is void as a matter of law. So what we have competing here is what does the possession of the

borrower -- how does that harm relate to having a foreclosure sale. Our posture to the Court and our argument is that it doesn't harm the borrower at all. They continue to live there. There's case law we've cited that says that an eviction action at the end of the redemption period may be automatically stayed while the lender is basically forced to either incur all these costs on their own during this six-month period or nine-month period or however long they are enjoined from foreclosing while the borrower enjoys the benefit of living in the property without us having any ability to evict them during the lawsuit.

I haven't looked at the cases, so I'm speaking blindly as to what they say, but I see no harm to the borrower. Whether the foreclosure sale happens on September 23rd or not, the status quo is Mr. Johnson continues with the lawsuit.

THE COURT: It's not quite that simple. Suppose you are living in a home that has been sold on a foreclosure sale. You're not just living there. I mean, you've got to make plans for your life, which may include buying another house or -- I mean, it isn't just as simple as that.

The other thing is the logical implication of your argument then is that -- to go back to my hypothetical where I'm aware that my neighbor has defaulted on his loan and that he could be foreclosed upon and I go ahead and bring

the foreclosure action -- that a court literally couldn't enjoin my foreclosure action. All the court could do is later on make me pay damages to my neighbors. I cannot believe that a court would not enjoin that foreclosure action.

MR. GOERLITZ: See, I disagree with the perspective, Your Honor, when you get to the point of they only have damages essentially after the foreclosure sale because, again, the court can always issue an order that the foreclosure sale is void as a matter of law.

THE COURT: Okay. So in my hypothetical then where you're my neighbor and I come in to foreclose on your mortgage, I notice the foreclosure sale, I'm going to foreclose on your home, a court literally can't stop it? They can't stop it?

MR. GOERLITZ: I'm saying --

THE COURT: Is that right, that a court couldn't stop me from foreclosing on you because you would not be suffering any irreparable harm?

MR. GOERLITZ: Correct. You don't suffer any irreparable harm until we try to displace you from the property because, again, my theory is --

THE COURT: I understand your theory. By just understand what you're saying, is today I try to foreclose on your home --

MR. GOERLITZ: Yep.

THE COURT: I'm just the guy down the street. I don't own the mortgage. I don't own the loan. I don't own anything. I want your butt out of our neighborhood because we've never liked you. So I bring the foreclosure action. Courts are hopeless to enjoin it because there's no irreparable harm. Does that sound right?

MR. GOERLITZ: The court is helpless to stop the sale, which is merely something of record with the county recorder.

THE COURT: There are certain things where that just can't be the law, and it just can't be the law that if I try to foreclose on my neighbor's home because I hear he has defaulted on his loan that a court couldn't stop the foreclosure sale. I have to think they could, and I have to think that's why there's these expressions in Minnesota law that the foreclosure sale does inflict a type of irreparable harm.

MR. GOERLITZ: Okay. And, again, this is a discretionary view. It's an equitable argument by the district court. Certainly if you come up with pretty egregious facts, we probably can agree that no district court judge is not going to grant a TRO. What we have here is no such thing.

THE COURT: I know how that differs from my

hypothetical, but the point still is, is that if there literally isn't any irreparable harm caused to the homeowner by a foreclosure sale, then under my hypothetical the judge could not foreclose the sale when I try to foreclose on my neighbor. I suspect most judges would find they have the authority.

Now, you can argue that the judge should choose not to exercise the authority in this case for other reasons, but some irreparable harm has to exist for me to be foreclosed when I try to foreclose on my neighbor.

Is there anything else you wanted to say, Mr. Goerlitz?

MR. GOERLITZ: I'm just curious, Your Honor, under your fact theory, what is the irreparable harm because I'm not seeing --

THE COURT: The irreparable harm is the law views someone's home differently than anything else. The law has always gone out of its way to protect peoples' homes in lots of contexts, including things that have nothing to do with this lawsuit, like the Fourth Amendment. And when you foreclose on my home, I'm in a position now where the clock is ticking and I'm going to lose my place to live or at least I'm in danger of losing my place to live.

And I suspect the reason why -- I read you the cases where they say that there is irreparable harm is

because that's considered a threat to the special relationship between a person and their home, the place they call home. That's why I suspect that Minnesota courts have found irreparable harm in this context.

I understand the logic of your position, and I even have some sympathy to it as an original matter. I suspect most judges would enjoin me in my hypothetical. And it's clear that other judges have enjoined not as egregious cases, and I suspect that's what's behind it, the protection of the relationship between a person and their home.

MR. GOERLITZ: And, again, just to make my argument clear, nothing has changed with regards to that relationship between a person in their home, other than the sheriff signing a document called a sheriff's certificate of sale and putting it of record with the county recorder. And that borrower is not harmed because they still enjoy the ability of that relationship to their home. They can continue to live there. They can continue to live there after the redemption period.

And the only way under your fact scenario they ultimately don't enjoy that right to live in their house is if they lose their case ultimately, because if they prevail, that harm is extinguished and you record an order that says that the foreclosure sale was null and void and they continue to live in the house without changing their rights.

THE COURT: Well, what happens under your view of this when the redemption period is about to expire and the homeowner, as is usually the case, doesn't have the money to redeem it, which is also often the case, doesn't have money to hire a lawyer, but in this case there is an exception? We don't usually have an attorney of Mr. Mortner's quality doing these cases. When the redemption period is about to expire and the underlying case hasn't been decided yet because it takes judges sometimes months or years to decide a case, at that point is the homeowner going to have irreparable harm?

MR. GOERLITZ: Yes.

THE COURT: So even under your argument we're just pushing back the injunction six months?

MR. GOERLITZ: Correct.

THE COURT: Instead of enjoining the sale, we just enjoin this.

MR. GOERLITZ: And that's why I argue it's not ripe at this point in the foreclosure process. It's only ripe if we bring an eviction proceeding, which may never happen and doesn't happen in many of these lawsuits.

Again, under my fact scenario, the court doesn't grant the injunction. We go to sale. It starts the clock of a redemption period; however, the borrower continues to live there. The redemption period expires. The court has

the matter under advisement. We don't commence an eviction for three, four, five, six months, sometimes even a year after the redemption period expires.

So my point is there is only irreparable harm the second we take the keys out of their hand to the house, which isn't happening and is speculative at this point because our argument is no harm simply is occurring by the sheriff's sale happening on September 23rd, and then no harm even becomes ripe unless we commence a conviction.

There's case law -- the *Bjorklund* and the *Nedashkovskiy* cases I cited -- that says the eviction shall be automatically stayed if there's a pending court action, so our hands may be tied.

THE COURT: I'm not going to enjoin this because I can't find a likelihood of success on the merits, so we don't need to get into this argument.

Is there anything else more you wanted to say, Mr. Goerlitz?

MR. GOERLITZ: No. I think I have every covered, Your Honor. I was just concerned about a ruling to the contrary that could be said in the future. Other than that, I think I'm covered at this point.

THE COURT: All right. Thank you, Mr. Goerlitz.

Mr. Mortner, is there anything you wanted to add?

MR. MORTNER: Yes, Your Honor, please. Just

working backwards a little bit through the discussion that has ensued, I would just further -- on the question of irreparable harm, Your Honor, I think that Your Honor is correct in his statements, what we might call, for lack of a better word, a unique homestead doctrine that appears to exist within the State of Minnesota, as well as throughout the United States. And I think that that concept finds support in additional cases, not only the *Strangis* and the *Medin* case, but in *Jackson* itself wherein the Supreme Court said that we require exact compliance with the statute.

Let's remember that foreclosure by advertisement is taking what used to be done previously in a judicial proceeding, in which case the bank would be the plaintiff and would have to prove standing, and allowing this non-judicial proceeding, and hence the Supreme Court said we require exact compliance with the statute. And I think in doing so what the court was saying was that we don't want injury to homeowners for wrongful foreclosures resulting from this liberalization, which is the notice by foreclosure procedure.

So if the Court were -- and I can't imagine it would -- were to find that foreclosure is not an irreparable -- let's correct our language. It's not irreparable harm. It is threat of irreparable harm. And that's an important distinction when you start talking about what could happen

in the future. Clearly there's a threat. The fact that there may be a right of redemption doesn't take away the fact that there's a threat. I want to make that point.

But if the court were to say that foreclosure did not constitute a threat of irreparable harm, the language in *Jackson* wherein the court requires exact compliance with the statute would be rendered meaningless because --

THE COURT: That comes up in a lot of our cases. It gets cited a lot to us, that language. My understanding of that language, it's not focused on irreparable harm so much as it's focused on that we're basically taking what were traditionally judicial functions and putting them in private hands and if we're going to do that, we're going to make sure they follow to the letter the statute that does that. Now, underlying that, of course, there's the notion that the stakes are high because we're talking about people's houses, I'll grant you that, but I don't think it's --

MR. MORTNER: How do you, as you said, Your Honor, make sure without judicial intervention?

THE COURT: I expect that most judges if they believed that there was a likelihood that the homeowner was going to be able to prove that the foreclosure was unlawful would enjoin the foreclosure and --

MR. MORTNER: Exactly my point, Your Honor.

MR. MORTNER: -- that's an implicit finding that there's something irreparable about the harm caused by the foreclosure.

So I'm not going to enjoin this foreclosure, not because I don't think there's irreparable harm but because for the reasons I've already described. I can't find you have a likelihood of succeeding on the merits of your lawsuit. I think you have an argument. I think the discovery may uncover that there is some argument there. But based on the materials before me, it looks to me like what will likely be the result of this lawsuit is a finding that this loan was transferred to the trust at the beginning of the trust and that the arrangements with respect to the title on this MERS-held legal title were specifically contemplated by the trust agreement so we don't have a violation of the trust agreement, hence no violation of New York law.

MR. MORTNER: Your Honor, I can't disagree with your statement of the law, but as far as your predictions, I tend to think otherwise and it's because there are so many, many cases in which the trusts do not have any evidence of a valid transfer.

THE COURT: And you might be right.

MR. MORTNER: In fact, courts in some states said we're putting the burden on the trust from the get-go

because you never come in here with it.

THE COURT: I can't talk about trusts. We have lots of mortgage cases, and I can tell you in almost every one of them the bank usually the bank's attorney has a folder there in front of him and it has an original copy of the note.

We get a lot of these ink signature cases where someone alleges you can't prove that I -- give me the note with my ink signature, and typically the bank has it in front of them. The bank says, Your Honor, here it is, there's the ink signature. At least in Minnesota we have done a little bit better. Typically, Wells Fargo and U.S. Bank tend to be the two involved in the most litigation, and they typically can put their hands on that.

That may be your experience and you may turn out to be right in this case, but I just don't think at this point I can find a likelihood that the bank will be unable to show that it acquired the loan at the start-up of the trust.

MR. MORTNER: Well, Your Honor, I must remind you that we do have before the Court today also a motion from the plaintiff for temporary injunction. Up until now, there has not been a notice of foreclosure because Mr. Goerlitz, pending today's argument, consented to adjourn it to September 23rd, which is later this week. As of yet he has

not consented to adjourn it further than that. So, therefore, I do have to ask the Court that we do have a temporary injunction pending the final determination of these motions in order to maintain the status quo.

THE COURT: Mr. Mortner, I don't think I can give you that temporary injunction for the reasons I've stated, which I won't go through it all again. I don't think sitting here I can find that you have a reasonable likelihood of succeeding on the merits of your lawsuit. Without that reasonable likelihood, I don't think I can grant the temporary restraining order.

I would like it if Wells would -- because I believe that we can get the discovery done and this thing teed up pretty quickly, it would be nice if Wells would give us a little more time before going forth with the foreclosure sale, but I don't think I can enjoin the foreclosure sale.

MR. MORTNER: Well, Your Honor, I beg to just object and differ because I think that Wells certainly had every opportunity here. They came in to this motion saying you must accept our pleadings as true. That was the argument that they made.

THE COURT: They are right on a judgment on the pleadings, which is what you captioned your motion and how you describe your motion in the first sentence. They do

have to accept the pleadings as true.

MR. MORTNER: We also had Rule 26 disclosure. They are saying the fundamental fact of their case is that they had a proper negotiation of the note in 2007 and yet they offered no evidence of that in their Rule 26 disclosure. So having done that, I don't think it's fair to say that we haven't shown a likelihood. They had a duty to provide that evidence; they haven't done so. So, at the very least, the Court should maintain the status quo.

THE COURT: All right. I disagree with you on that.

Is there anything else you wanted to say, Mr. Mortner?

MR. MORTNER: Just a couple other things, Your Honor, if I may.

On this question of standing to raise the issues pertaining to the relationship of MERS and Wells Fargo, I think the Court is absolutely correct in its analysis of the issue. I would just point out -- you mentioned that Wells Fargo has offered some law in support of their position that there is no such standing, and specifically what they offered was a case titled *Carpenter*, the Artisans Savings Bank. Our position is that that case is in a posit because in that case --

THE COURT: That's where the legal title holder --

the person who had equitable -- they proceeded in the name of the legal title holder?

MR. MORTNER: That's right, Your Honor.

THE COURT: It's the other case I was thinking of, the *Rush* case, which I explain. I believe the *Rush* case is an ultra vires case, is what I believe it is. I think it's a little different than the case that you're raising here.

MR. MORTNER: Well, then I think we have no further things to say, other than I would also echo the Court's request that defense give us a little bit more time and continue adjourning the notice so that we can finish fleshing out this case.

THE COURT: Okay. Thank you, Mr. Mortner.

I'm not going to take the time to write an opinion. I think I have made my views on all these issues pretty clear and, therefore, I'm going to deny all the motions pending before me. I don't believe I can give the plaintiff either summary judgment in part because I don't think it was a properly set up summary-judgment motion for the reasons I've described. It was set up and understood by Wells Fargo as a motion for judgment on the pleadings. I certainly can't grant judgment on the pleadings for the plaintiff because I have to take the allegations in Wells Fargo's answer as true. So I can't grant any judgment for the plaintiffs.

I also don't believe I can grant a temporary injunction to the plaintiffs because, for the reasons I've described, I cannot find that they have a substantial likelihood of success on the merits.

As to Wells's motion to dismiss, I disagree with the motion insofar as it relies on the failure of the complaint to talk about the loan or the failure of the complaint to talk, or talk more, about irreparable harm.

I do think Wells is correct that it was entitled to more information in the complaint about why the February transfer or assignment of legal title to the mortgage violated the trust agreement, but Wells since has gotten that information. To make the plaintiff amend the complaint simply to tell Wells something it already knows at this point I think would just be a waste of all of our time and the parties' money. So I'm going to deny that motion as well.

What I would ask you, as I have talked to you about, talk to you each other now after I leave. Figure out how you can most quickly, and efficiently, and cheaply get the information about the loan from Wells to the plaintiff. Once Mr. Mortner has that information -- if you believe, Mr. Mortner, that you still have a basis for challenging Wells's standing to foreclose, you can bring a motion and I'll try to get you in here quickly on that. If Wells shows

you to your satisfaction that it did properly acquire the note back at the start-up of the trust, then you should dismiss your lawsuit. But, you know, as we've talked about at length today, this is all going to turn on the loan and Wells's acquisition of the loan as trustee for the trust. That information is presumably easily accessible to Wells and easily communicable to the plaintiff. And so if you guys could work together to get that done quickly and efficiently, we can get this case resolved one way or the other.

All right. Thank you, gentlemen, for your help with the case. As I said, please talk to each other about how we can most quickly get the case resolved.

THE CLERK: All rise.

(Court adjourned at 10:05 a.m.)

* * *

I, Debra Beauvais, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: s/Debra Beauvais
Debra Beauvais, RPR-CRR